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In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1102. 110

HAROLD H. BARNETT,
Successor Trustee of The Allied Products Company, Bankrupt,
Petitioner,

vs.

MARYLAND CASUALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT, MARYLAND CASUALTY COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

The facts of the case are sufficiently stated by Petitioner (petition pp. 4-6) and need not be repeated here.

SUMMARY OF ARGUMENT.

The position of Respondent is as follows:

1. The doctrine of *Benedict v. Ratner,* 268 U. S. 353 (1925) is not applicable to the issue here. The decision of the Circuit Court of Appeals is not in conflict with the decision of this Court in the *Ratner* case. The District Court found that the assignment became operative upon default and that the bankrupt exercised no dominion over the funds after default. This finding was affirmed by the Circuit Court of Appeals.

2. The decision of the Circuit Court of Appeals is in accord with the applicable law of Ohio. Under the law of

Ohio a prior assignee, even without giving notice, prevails over a subsequent attaching creditor.

ARGUMENT.

I. The Doctrine of Benedict v. Ratner, 268 U. S. 353, is Not Applicable and the Decision of the Circuit Court of Appeals is Not in Conflict Therewith.

The first reason relied on by Petitioner for the allowance of the writ is that the decision of the Circuit Court of Appeals is in direct conflict with the decision of this Court in *Benedict v. Ratner,* 268 U. S. 353 (1925). The Circuit Court of Appeals, however, concluded that the doctrine of the *Ratner* case was not applicable here. The Court said (R. 81):

> "The District Court correctly concluded that the doctrine of *Benedict v. Ratner* has no applicability here."

In the *Ratner* case this Court held that under the law of New York an assignment of accounts receivable was void as to creditors of the assignor because the assignor (as the agreement permitted him to do), collected the assigned accounts without accounting to the assignee. Mr. Justice Brandeis stated (268 U. S. 364):

> "* * * the arrangement for the unfettered use by the (assignor) company of the proceeds of the accounts precluded the effective creation of a lien, and rendered the original assignment fraudulent in law."

Benedict v. Ratner does not apply here for the reason that here the arrangement did not permit the assignor to exercise, and the assignor, as a matter of fact, did not exercise, dominion over the assigned funds. Both the Circuit Court of Appeals and the District Court so found (R. 80, 65, 66).

The question is one that depends entirely on a proper interpretation of the facts. The facts themselves are not

in dispute, since the matter was submitted on an Agreed Statement of Facts (R. 16), and no other evidence was offered by either side.

The assignments to Respondent are dated March 31, 1939, in one case, and May 25, 1939, in the other. The two contracts were completed and accepted by Summit County on October 23, 1939. On that date there became due Bankrupt $1,136.20 on one contract and $3,052.14 on the other, which funds are the subject matter of this proceeding. All other sums under these contracts were paid to Bankrupt as they became due.

On December 16, 1939, Bankrupt defaulted on a contract with United States, which was bonded by Respondent. There was *then* due Bankrupt under the two Summit County contracts the funds here in dispute. No part of such funds was paid to Bankrupt after this date.

The essential point of the inquiry is: What funds were assigned? The pertinent language of the assignment is (R. 9, 10):

> "* * * in the event of claim or default in connection with any other former or subsequent bonds executed for us or at our instance and request all payments due or to become due under the contract covered by the bond(s) herein applied for, shall be paid to the (Surety) Company—and this covenant shall operate as an assignment thereof * * *."

Both the District Court and the Circuit Court of Appeals held that this language created a present conditional assignment, one that became effective only upon default, and that the funds assigned were the funds due at the time of default.

The District Court said (R. 65, 66):

> "The fact seems to be that no dominion was exercised over the Summit County funds by the bankrupt following default. The event which was to make the assignment effective, under my view, had occurred and

the bankrupt drew no further payments, had no right to, nor did it undertake to do so."

The Circuit Court of Appeals said (R. 80, 81):

"(3) The Referee in Bankruptcy decided that, upon the authority of *Benedict v. Ratner,* 268 U. S. 353, the assignments to the appellee surety company were void as against the appellant trustee in bankruptcy, inasmuch as the surety had permitted the bankrupt to exercise unfettered dominion over the proceeds of the Summit County contracts up to the date of the bankruptcy. In reversing the referee's ruling, the District Judge found that no dominion over the funds had been exercised by the bankrupt after its default, which was the event necessary to make the assignment operative. The evidence supports this finding.

"In *Benedict v. Ratner, supra,* a present unconditional assignment was involved. The assignor was permitted to collect the assigned accounts and was not required by the terms of the assignment to apply such collections on the secured debt, except upon specific direction of the assignee. Nevertheless, the assignee had the right to enforce the assignment before maturity of the loan. By the law of New York—which governed—a transfer of property as security for a debt with reservation in the transferor of the right of disposition of the property and the application of its proceeds to his own uses was fraudulent and void as to creditors.

"In the case at bar, the assignments rested in operative effect upon a condition precedent, namely, default in the performance by the bankrupt of its contractual obligations for which the assignee stood liable as surety. The appellee surety company did not permit the bankrupt to collect the funds due it from the Summit County contracts, after the bankrupt's default on the Cleveland contract, and notified the County Commissioners to withhold payment to the bankrupt of all estimates and retained percentages. By the law of Ohio, which governs here, the assignments, as has been shown, were valid and prior in right to the claims of subsequently attaching creditors, and therefore,

have priority over claims of the trustee in bankruptcy. Compare, *In re Cincinnati Iron Store Co.*, 167 Fed. 486 (C. C. A. 6).

"The District Court correctly concluded that the doctrine of *Benedict v. Ratner* has no applicability here."

The decision of the Circuit Court of Appeals as to the nature and effect of the assignment is in accord with the decision of the Circuit Court of Appeals for the Fourth Circuit in a similar case. *Lacy v. Maryland Casualty Co.*, 32 Fed. (2d) 48 (1929).

II. Under Ohio Law a Prior Assignee Even Without Giving Notice Prevails Over a Subsequent Attaching Creditor.

The second reason relied on by Petitioner for the allowance of the writ is that the decision of the Circuit Court of Appeals is in conflict with the Ohio law.

The precise issue is: What rule of Ohio law is applicable to the case? The District Court and the Circuit Court of Appeals applied the rule that a prior assignee prevails over a subsequent attaching creditor, relying on *Copeland v. Manton*, 22 O. S. 398 (1872); *Burgunder v. Weil*, 60 O. S. 234 (1899); *Warren Guarantee Title & Mortgage Co. v. Williams*, 27 O. App. 505 (1928); and *Kittinger Witt Co. v. Brookins*, 35 O. App. 266 (1929). The Circuit Court of Appeals said (R. 78, 79):

"(2) The next question and the real issue in the case is whether, under Ohio law, a present assignment of funds, which may accrue and be ascertained in the future upon the happening of a specified event (in this case, default upon another contract), is valid and entitled to priority over the claims of subsequently attaching creditors of the assignor who became creditors without notice of the assignment. The answer is that, in Ohio, the assignment is valid, and has priority over the attaching creditors' claims.

> "The assignment involved here is, from its terms, a present assignment and not a mere promise to assign in the future. The trustee in bankruptcy is in the same position as if he were an attaching creditor."

Petitioner concedes the rule of law for which these cases stand, but disputes the applicability of that rule to the facts of this case (Brief, p. 27). The distinction urged is that these cases are not concerned with an assignment under which the assignor has the power to collect and use all or any part of the fund assigned without accountability. The answer is that the present case likewise does not concern such an assignment.

The dispute over the Ohio law is thus turned by Petitioner into the same dispute argued under Point I, *supra*. By the same token, the Ohio cases relied on by Petitioner are not applicable for the reason that they turn on the reservation of a power to sell mortgaged chattels. The Circuit Court of Appeals said (R. 80):

> "Ohio cases cited by appellant, involving mortgages of property or chattels where possession was essential to ascendancy of the mortgages over subsequently attaching creditors, are not pertinent where an assignment is, as in the instant case, made of intangible property or money in the hands of a third party."

By the argument of Petitioner this case is narrowed to a single issue, namely, What funds were assigned by Bankrupt to Respondent? The answer given to this question will determine whether *Benedict v. Ratner* is applicable and will also determine the proper Ohio law to be applied.

We submit that the District Court here reached the correct answer to this question, and that the Circuit Court of Appeals was right in affirming its judgment.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

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